STATE OF MICHIGAN

COURT OF APPEALS

TERRENCE COX and OLIVIA COX,

Plaintiffs-Appellants/Cross-appellees,

v

MUSSON SAND & STONE, INC., ESTATE OF GEORGE MUSSON, NORMAN LINK, BETTY LINK, TERRANCE LINK, MILDRED MUSSON, LARRY LUCAS, ZELDA LUCAS, and SUMMERFIELD TOWNSHIP,

Defendants-Appellees,

and

JEFFREY LINK and LENORE LINK,

Defendants-Appellees/Cross-appellants,

and

JEROME LINK and KAREN LINK,

Defendants.

UNPUBLISHED
March 31, 2005

No. 251936
Monroe Circuit Court
LC No. 97-006736-NZ

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action following a bench trial. Plaintiffs filed this litigation in an attempt to recoup damages for loss of water quality and quantity purportedly caused by the mining activities on adjacent properties, owned and operated

by defendants. The trial court concluded that plaintiffs failed to prove causation and damages. We affirm.[1]

Plaintiff[2] Olivia Cox and her husband, plaintiff Terrence Cox, purchased property owned by her father in 1980. A pond had been created on the property in 1976, prior to their purchase. Plaintiffs began construction of their "dream home" on the property, which consisted of the home, a well, a leach field, a septic field, and the pond. Plaintiffs acted as contractors for the project, and the home was completed over a two-year period. Plaintiff was aware of the mining operation on nearby property, but initially had no objection to the activity. Plaintiff's sole concern was the traffic from trucks to and from the property while her children waited for the school bus.

In 1994, plaintiff became concerned about the substantial water drop in the level of the pond. Plaintiff initially attributed the reduction in water level to drought conditions. However, plaintiff learned that nearly 20,000 gallons of water was being pumped from the area to excavate dry sand. Plaintiff believed that the mining activity on adjacent property caused the water levels in her pond to drop. Plaintiff became further concerned when other observable changes in the condition of her property occurred. The vegetation and algae in the pond flourished despite treatment by a professional company, "suds" appeared on top of the pond water, dead zones of fish occurred in the pond, and the color of the sand changed to rust. Plaintiff even noticed the "suds" condition when she poured water from the faucet into a pan. Consequently, plaintiff hired a company to perform an evaluation of the water on her property.

Based on the information received, plaintiff believed that the mining activity caused the water level of the pond to drop, changed the direction of the groundwater on the property, and the changes were permanent in nature unless corrective measures were taken. In response to the changes in the pond, plaintiffs and their children did not spend all day swimming in the pond, although plaintiff did not forbid her children from using the pond. Plaintiffs could no longer dive into the water because of the shallowness of the water level. Additionally, since 1995 or 1996, plaintiff began to use bottled water for cooking and drinking. Well water was only utilized for washing clothes or dishes.

Plaintiff acknowledged that she never received a definitive conclusion that her drinking water was unsafe. Moreover, plaintiff did not spend additional monetary resources to test her drinking water. She attested that the local health department did not want to become involved in the dispute and did not continue to test her water. Rather, based on her "feeling," plaintiff chose to consume bottled as opposed to well water.

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[1] Based on our affirmance of the trial court's judgment, we need not address the issue raised on cross appeal.

[2] The bulk of the testimony at trial delineating the adverse impact of the mining on plaintiffs' property was set forth by plaintiff Olivia Cox. Consequently, the use of the singular "plaintiff," will refer to plaintiff Olivia Cox.

Plaintiffs notified local, state, and federal authorities regarding the mining activities on adjacent property and the reported adverse impacts. Despite documentation of violations for failing to comply with the permit conditions for mining, the mining operation continued. Plaintiff learned that she would have to support any alleged damages with scientific support. Therefore, plaintiffs expended $70,000 for an environmental assessment of the impact of the mining on their property. Based on this evaluation, plaintiffs concluded that the drop in the water level of the pond and the water quality from the faucets was adversely impacted by the mining activity unless corrective measures were taken.

Unable to obtain relief from the mining activities, plaintiffs decided to "cut their losses" and listed their home for sale with a relative. In 1998, after a six month listing period, plaintiffs did not receive any written offers for their home with an asking price of $359,000. This listed price was determined by an average of three estimates of market value of the property. In 1999, plaintiffs listed the home with an asking price of $399,000 and received no written offers. Plaintiffs acknowledged that they provided a disclosure form to indicate that they could not guarantee the water quality or quantity. However, plaintiff Terrence Cox further acknowledged that no one with a well could guarantee the quality of the water. Plaintiff testified that despite an evaluation of the property in 2001, at $358,000, the home had not been listed for sale. Plaintiff testified that they were advised not to re-list the home until the problems had been resolved. Additionally, plaintiff disputed the valuation of $358,000, alleging that it was not based on comparable properties.

Plaintiff expressed concern regarding the supervision of the mining activity on the adjacent property. After plaintiff reported the mining violations, the Michigan Department of Environmental Quality (MDEQ) sent her a notice of violation for her pond that had been constructed on the property prior to plaintiffs' ownership. Plaintiff felt that the violation was a form of intimidation for her report of the violations on the adjacent parcel. Plaintiff testified that, after submitting a fee for the construction of the pond, the MDEQ rescinded the notice of violation and closed the file. Plaintiff acknowledged that she was not satisfied with the response received from regulatory and government agencies to her complaints. However, she denied the allegation that the litigation was in retaliation for the lack of response.

Dr. Mao Huang, an environmental engineer with a concentration in hydrology and hydrogeology, was retained by plaintiffs to perform an assessment of sand mining activities on plaintiffs' pond. Dr. Huang visited the property and installed four field monitoring wells. After performing his evaluation, Dr. Huang concluded that there was a 1.9 foot drop in the level of plaintiffs' pond as a result of the mining activities on adjacent properties, and there was a change in the direction of the groundwater. However, Dr. Huang acknowledged that the mining occurred over a period of time. Consequently, Dr. Huang had to rely on information from outside sources, such as plaintiffs' statement regarding the substantial drop in water level in 1994, and extrapolate from other information. For example, Dr. Huang did not conduct a county wide assessment and did not assess ponds labeled as 1 and 2. If there was a uniform drop of water across the county, climate or drought would be a plausible explanation for drop in water levels. Dr. Huang reached his conclusion that the water drop in plaintiffs' pond was 1.9 feet by examining the "cone of depression," the location where water flows to when digging below groundwater occurs.

Ron Gallagher, a professor from the University of Toledo, was retained to render an opinion regarding the effect of defendants' mining activities. Gallagher testified that the most effective method for assessing the impact on water was to obtain soil samples. Hydraulic conductivity was the measure of the resistance of porous media to transmit fluid. Because soil samples were not allotted for in the cost of an evaluation, Gallagher had to rely on reports of the geology in Monroe County. Gallagher concluded that the impact of a cone of depression would extend to a distance of 480 feet. Therefore, at a distance of 1,200 feet, there would be some effect, but the effect would be minimal. Gallagher examined the data and methodology of Dr. Huang. He did not agree with the methodology employed by Dr. Huang because the use of a two-dimensional model only considered the flow in a horizontal direction. The use of a three dimensional model incorporated horizontal and vertical features and calculated evaporation of water from normal growth cycles.

After the conclusion of testimony, the trial court rendered its decision of no cause of action in a written opinion. The trial court concluded that plaintiffs had failed to prove causation. Specifically, the trial court concluded that there was no satisfactory showing of a correlation between the mining activity and plaintiffs' concerns regarding water loss and water quality. The trial court further concluded that there was no proof of damages arising from any of the alleged causes of action. In reaching this conclusion, the trial court rejected plaintiffs' proofs regarding their attempts to sell their home. Following the trial court's ruling, the trial court rendered an award of costs and attorney fees, but reduced the amount requested by defendants.

Plaintiffs raise a litany of issues that correlate to the trial court's factual findings and conclusions of law in rendering the verdict.[3] A trial court's findings of fact in a bench trial are reviewed for clear error, but conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 399 (2001). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Issues of witness credibility present a question for the trier of fact, and we defer to the trier of fact's special opportunity to judge the witnesses who appear before it. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). When deciding a motion for new trial involving a challenge to the evidence, the trial court must determine whether the overwhelming weight of the evidence favors the losing party, and this Court, in turn, reviews that determination for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id*.

Plaintiffs first allege that the trial court erred in dismissing the nuisance per se claim, based on the erroneous belief that loss of water was not a real damage or injury. Plaintiffs further question whether loss of water level and depth were legally cognizable injuries.[4] Based

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[3] Indeed, although plaintiffs' brief on appeal raised twelve separate and distinct issues on appeal, the discussion of the issues did not mirror the statement of the questions presented. Rather, multiple issues were grouped together and overlapped for purposes of discussion.

[4] The statement of this issue does not allege that the trial court rendered a decision to the (continued…)

on our review of the trial court's findings of fact and conclusions of law, we conclude that these challenges are without merit. We note that the trial court never concluded that loss of water, whether expressed in terms of height level or depth, was not a compensable injury. Rather, the trial court, after rendering factual determinations, concluded that plaintiffs did not support their claims with regard to causation and damages. That is, plaintiffs failed to correlate any purported losses in water quantity and quality to the mining activity. The trial court was not operating under a mistake of law regarding the type of damages that could be awarded. Accordingly, the challenges on these grounds are without merit because the allegations do not reflect an accurate presentation of the trial court's conclusion.

Plaintiffs next allege that the trial court erred in declining to order abatement of a zoning ordinance violation. We disagree. This issue presents a question of statutory construction. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Although a trial court's factual findings are reviewed for clear error, the application of the law to the facts is reviewed de novo. *Centennial Healthcare Management Corp v Dep't of Consumer & Industry Services*, 254 Mich App 275, 284; 657 NW2d 746 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). The use of the term "shall" denotes mandatory action. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). However, the use of the term "may" indicates discretionary action. See *Howard v Bouwman*, 251 Mich App 136, 145; 650 NW2d 114 (2002).

MCL 125.294 provides:

> A use of land, or a dwelling, building, or structure including a tent or trailer coach, used, erected, altered, razed, or converted in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated and the owner or agent in charge of the dwelling, building, structure, tent, trailer coach, or land is liable for maintaining a nuisance per se. The township board shall in the ordinance enacted under this act designate the proper official or officials who shall administer and enforce that ordinance and do either of the following for each violation of the ordinance:
>
> (a) Impose a penalty for the violation.
>
> (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

Applying the rules of statutory construction to the trial court's factual findings, *Centennial, supra*, we cannot conclude that the trial court erred in failing to order abatement of any nuisance

(…continued)

contrary.

per se. To the extent that the use of land was altered by mining activity, this mining activity did not occur on plaintiffs' property, but rather, occurred on adjacent property. The trial court concluded that plaintiffs failed to meet their burden of proof in correlating the activity on adjacent property to the changes in water level and quality on plaintiffs' property. Moreover, any mining activity ceased in 1999. Therefore, there was no activity to order abated at the time of trial. Therefore, applying the trial court's factual findings to this statute, we cannot conclude that the trial court erred in failing to grant plaintiffs' relief.

Plaintiffs next allege that the trial court erred in failing to order legal damages and that the factual findings were against the great weight of the evidence. We disagree. Reviewing the trial court's factual findings based on the clearly erroneous standard, *Chapdelaine, supra*, and giving deference to the trial court's special opportunity to assess the credibility of the witnesses who appear before it, *Clark Estate, supra*, the challenges raised are without merit.

Here, the trial court was presented with diametrically opposed versions of events. Dr. Huang asserted that the mining activity caused a cone of depression that lowered plaintiffs' pond level by 1.9 feet. However, Dr. Huang's opinion was, to some extent, based on hearsay. That is, his evaluation of the property did not occur until 1997. Therefore, he had to rely on information regarding the substantial drop in water level in 1994, from plaintiffs. He also did not take soil samples from the area, but extrapolated from existing information. Likewise, Gallagher did not take soil samples from the area. However, he challenged the methodology employed by Dr. Huang and calculated any cone of depression as having a minor impact on plaintiffs' property. Additionally, Gallagher challenged the conclusion that the groundwater direction had permanently changed, citing to measurements on different dates wherein the direction varied from day to day. The trial court was presented with two divergent views regarding the impact of any mining activity and rejected the contention that adjacent mining activity correlated to any adverse impact to plaintiffs' property.

Moreover, we note that the trial court rejected the damage testimony presented by plaintiffs. Plaintiffs listed their home for sale, but their listing agent was a relative. Although plaintiffs had not received a definitive conclusion that their drinking water was unsafe, plaintiffs gave a disclosure indicating that they could not guarantee the water quality or quantity. Plaintiffs initially listed the property at $359,000 in 1998, and in 1999, listed the property at $399,000. Plaintiffs testified that they never received a written offer to purchase and were told that they should not list the property for sale until the problems had been resolved. Plaintiffs did not present the testimony of the listing agent or the head of the listing agency. Moreover, plaintiff Terrence Cox admitted that any property with well water could not provide a guarantee regarding water quality. The trial court expressly rejected this damage testimony. Thus, the verdict was not against the great weight of the evidence, and the trial court's rejection of a damage award was based on his factual findings.[5]

[5] Plaintiffs also allege that the trial court engaged in "baseless" fact finding. The trial court's discussion of the water level of Lake Erie does not alter the factual finding with regard to causation and damages.

Plaintiffs next allege that the trial court erred in failing to enter summary judgment against defendants when they failed to file responses to the motion challenging causation. We disagree. Appellate review of a summary disposition decision is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of material fact exists for trial. *Id*. Once a motion for summary disposition based on MCR 2.116(C)(10) is made and supported, an adverse party may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts setting forth a genuine issue for trial. MCR 2.116(G)(4). If a party does not respond, judgment, *if appropriate*, shall be entered against the nonmoving party. *Id*. When considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the trial court must consider all of the admissible documentary evidence *then filed* in the action or submitted by the parties. MCR 2.116(G)(5). Moreover, when the truth of a material factual assertion is contingent upon witness credibility, summary disposition is inappropriate. *Auto Club Ins Ass'n v State Auto Mutual Ins Co*, 258 Mich App 328, 335-336; 671 NW2d 132 (2003).

Although defendants did not file an expert opinion to refute plaintiffs' documentary evidence, at the time of the motion for summary disposition, the trial court had presided over a multi-day evidentiary hearing wherein plaintiffs requested injunctive relief. The trial court rejected the claim for injunctive relief. In rejecting the request, the trial court questioned the testimony presented by Dr. Huang, the sole expert, noting that it was premised on hearsay. Thus, the trial court was entitled to conclude that there were deficiencies in the documentation presented by plaintiffs in light of the evidentiary hearing. When a motion is made, but not supported, denial of the dispositive motion is proper. MCR 2.116(G)(4). Consequently, the trial court did not err in denying the motion under the circumstances.

Plaintiffs next allege that the trial court erred in allowing expert testimony at trial when defendants did not disclose expert Gallagher during discovery. We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). "An error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice." *Id*.

Plaintiffs allege that motions to compel disclosure of experts were repeatedly filed, and defendants failed to name an expert. Consequently, the trial court ruled that defendants were barred from presenting an expert. An order reducing that ruling to writing was not preserved in the lower court record. Moreover, plaintiffs, as the appellants, had the burden of filing a complete record on appeal, and the failure to present record support for a proposition is fatal to a claim. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Indeed, plaintiffs failed to present any transcript evidencing a ruling barring expert testimony. Moreover, review of the lower court file reveals that defendants filed a witness list on September 30, 1999, that identified Gallagher as a witness.[6] Additionally, the township defendant, when

[6] The witness list filed by defendants did not distinguish between lay and expert witnesses. (continued…)

added to the litigation, expressly disclosed Gallagher as an expert witness. Consequently, under the circumstances, we cannot conclude that the trial court abused its discretion by admitting the testimony of Gallagher. *Davidson, supra*.

Plaintiffs next allege that the trial court erred in finding that plaintiffs had unclean hands. Based on our review of the record, this challenge is without merit. At trial, the circumstances underlying the construction of plaintiffs' pond were disputed. Plaintiffs alleged that the construction of the pond pre-dated their ownership, and in any event, it was believed that compliance with local laws, in effect at the time, occurred. However, defendants elicited testimony from plaintiff that excavation from the pond occurred during the home construction to build hills around the home without a permit. Despite the accusations on both sides, the trial court noted that there appeared to be problems with equity by all parties. However, the trial court did not conclude that equity would be held against a particular party, concluding that there appeared to be a "set off." Indeed, the trial court's judgment of no cause of action was contingent on factual findings regarding causation and damages. The trial court never concluded that plaintiffs proved their causes of action and damages, but would not recover because of unclean hands. Thus, the statement of this issue does not reflect an accurate assessment of the trial court's holding.

Plaintiffs next allege that the trial court erred in failing to render an equitable decision regarding the environmental claim where any person may seek enforcement. However, at the time of trial, there was no need to order any abatement because the mining activities were no longer occurring. The trial court did not find a correlation between the adjacent properties and plaintiffs' water conditions. Additionally, there was no current testimony from MDEQ officials regarding the status of the adjacent properties.[7] Defendants, the adjacent property owners, did not seek remediation. Under the circumstances, the trial court did not err. See *Jackson v Thompson-McCully Co*, LLC, 239 Mich App 482, 489; 608 NW2d 531 (2000).

Plaintiffs next allege that the trial court erred in granting summary disposition of the claim of inverse condemnation against defendant township. We disagree. In an inverse condemnation action, the plaintiff bears the burden of proving causation, by establishing that the government's actions were a substantial cause of the decline of the property's value. *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979). The plaintiff must further establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *Id*. Following de novo review, *Capuzzi, supra*, the trial court properly granted defendant township's motion for summary disposition. Plaintiffs failed to establish that defendant township abused its power by affirmative action directed at their property. Rather, it was defendant township's alleged inaction with regard to enforcement of permit conditions that caused any damage to plaintiffs' property.

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However, the witness list filed by plaintiffs on October 1, 1999, did not distinguish between lay and expert witnesses.

[7] The testimony from the sole MDEQ official had been transferred to a new location, and there is no indication that he was aware of the condition of the adjacent properties at the time of trial.

Lastly, plaintiffs allege that the trial court erred in ordering the amount of case evaluation sanctions. We disagree. This Court reviews an award of attorney fees for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). An abuse of discretion occurs only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. at 438. There is no precise formula for determining the reasonableness of an attorney fee. *Michigan Tax Management Services Co v City of Warren*, 437 Mich 506, 509; 473 NW2d 263 (1991). The following factors may be considered: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Id*. at 509-510.

Review of the ruling regarding attorney fees reveals that the trial court examined all of the relevant factors and gave extensive consideration to the issues raised by plaintiffs, including duplication of services, the retention of out of county attorneys, and appropriate billing rates. Under the circumstances, we cannot conclude that the decision was an abuse of discretion. *Gates, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio